

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

D. EARL ROUSH,

Plaintiff,

v.

REBECCA LEMKE, et al.,

Defendants.

No. C06-1055Z

ORDER

Plaintiff Earl Roush has filed suit in this court seeking relief for violations of his constitutional rights under 28 U.S.C. § 1983, and violation of R.C.W. 9A.82.060, criminal profiteering. Mr. Roush named as defendants Rebecca Lemke, James Hershey, Mark Poch, the Bellevue Police Department, the City of Bellevue, and the Bellevue City Council (collectively “Bellevue Defendants”). Mr. Roush has also named as defendants the Washington State Patrol, State Trooper Robert Schroeder, State Trooper John McAuliffe, the State of Washington, the Washington Department of Transportation, and unnamed Washington Department of Transportation Employees (collectively “State Defendants”). This matter comes before the court on State Defendants’ Motion for Summary Judgment, docket no. 26.

1 Mr. Roush alleges that the Washington State Patrol troopers improperly had his
2 vehicle towed on May 16, 2001 and again on June 6, 2001. Second Amended Complaint, ¶
3 133, 137. Mr. Roush also alleges the State Defendants were involved in a conspiracy with
4 the City of Bellevue to deprive Mr. Roush of his constitutional rights. Id., ¶ 156, 166. Mr.
5 Roush also alleges that the State Defendants have been involved in a pattern of criminal
6 enterprise by issuing fraudulent parking citations to generate revenues. Id., ¶ 177.

7 **Motions to Strike**

8 Mr. Roush has moved to strike State Defendants' reply to his opposition to summary
9 judgment. Request to Strike Defendants' Response, docket no. 42. The Court has discretion
10 to consider late filings. Jenkins v. Commonwealth Land Title Ins. Co., 95 F.3d 791, 795 (9th
11 Cir. 1996). Mr. Roush has alleged no prejudice to himself nor has he asked for additional
12 time to submit materials. The Court DENIES Mr. Roush's request to strike because no
13 prejudice exists and the matter can be decided on the merits.

14 State Defendants have moved to strike Mr. Roush's motion to continue discovery.
15 State Defendants' Reply, docket no. 37 (asking to strike docket no. 30). Although Mr.
16 Roush's reply and subsequent declaration seeking time for additional discovery were not in
17 strict conformance to Federal Rules of Civil Procedure 7(b) and 7(d), the State Defendants
18 were not prejudiced and the matter is fully briefed before this Court. The Court therefore
19 DENIES State Defendants' motion to strike, docket no. 37.

20 **Summary Judgment**

21 When considering a motion for summary judgment, the district court's role is not to
22 weigh the evidence, but merely to determine whether there is a genuine issue for trial.
23 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Freeman v. Arpaio, 125 F.3d
24 732, 735 (9th Cir. 1997); May v. Baldwin, 109 F.3d 557, 560 (9th Cir. 1997). Summary
25 judgment is appropriate if, after viewing the evidence in the light most favorable to the party
26 opposing the motion, the court determines that there is no genuine issue of material fact and

1 the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(e);
 2 Vander v. United States Dep't of Justice, 268 F.3d 661, 663 (9th Cir. 2001); Morrison v.
 3 Hall, 261 F.3d 896, 900 (9th Cir. 2001); Freeman, 125 F.3d at 735; May, 109 F.3d at 560;
 4 Tellis v. Godinez, 5 F.3d 1314, 1316 (9th Cir. 1993).

5 The non-moving party may seek a continuance of decision on the summary judgment
 6 motion in order to conduct additional discovery. See Fed. R. Civ. P. 56(f). To obtain
 7 additional discovery, the non-moving party must submit "affidavits setting forth the
 8 particular facts expected from the movant's discovery Under Rule 56(f), an opposing
 9 party must make clear what information is sought and how it would preclude summary
 10 judgment." Barona Group of the Capitan Grande Band of Mission Indians v. Am. Mgmt. &
 11 Amusement, Inc., 840 F.2d 1394, 1400 (9th Cir. 1987) (citation and internal quotations
 12 omitted); see also California v. Campbell, 138 F.3d 772, 779 (9th Cir. 1998).

13 (1) Eleventh Amendment Immunity

14 The State Defendants moved for summary judgment asserting that the State
 15 Defendants in their official capacity are immune from suit in federal court under the
 16 Eleventh Amendment. State Defendants' Motion for Summary Judgment, docket no. 26, at
 17 4. Mr. Roush concedes that the Eleventh Amendment affords the State Defendants immunity
 18 from suit. Plaintiff's Opposition Brief, docket no. 31, at 2. The Court therefore GRANTS
 19 summary judgment in favor of Troopers McAuliffe and Schroeder in their official capacities,
 20 the State of Washington, the Washington Department of Transportation, and unnamed
 21 Washington Department of Transportation Employees Defendants, on the issue of Eleventh
 22 Amendment immunity.

23 (2) Statute of Limitations

24 The time in which a § 1983 claim must be brought in federal court is controlled by
 25 state statutes of limitation that apply to personal injury actions. Wilson v. Garcia, 471 U.S.
 26 261, 268-71 (1985); Jones v. Vlanas, 393 F.3d 918 (9th Cir. 2004). R.C.W. 4.16.080(2)

1 provides for a three year statute of limitations for personal injury actions in Washington, and
2 controls this § 1983 claim. Rose v. Rinaldi, 654 F.2d 546, 547 (9th Cir. 1981). Mr. Roush
3 concedes that all the actions taken by the State Defendants were more than three years prior
4 to his commencement of this action. Plaintiff's Opposition Brief, docket no. 31, at 2. Mr.
5 Roush's claims against the State Defendants, acting in their official capacity, are barred by
6 Eleventh Amendment immunity and as a result, only the actions by the State Defendants in
7 their individual capacities need to be evaluated under the statute of limitations..

8 Mr. Roush asks that discovery be allowed under Federal Rule of Civil Procedure 56(f)
9 in order to provide facts that would support an exception to the statute of limitations, such as
10 equitable tolling. Response, docket no. 31, at 2–3. Mr. Roush's complaint and declarations
11 do not offer any factual basis for any exception to the Statute of Limitations for actions taken
12 by State Defendants, considering the complaint and the broadest reading of all declarations
13 on file.

14 Equitable tolling of the limitations period in a § 1983 action is governed by state law.
15 Cervantes v. City of San Diego, 5 F.3d 1273, 1275 (9th Cir. 1993). In Washington, the
16 predicates for equitable tolling are bad faith, deception, or false assurances by the defendant
17 and the exercise of diligence by the plaintiff. Millay v. Cam, 135 Wn.2d 193, 206 (1998).
18 Mr. Roush has not alleged such actions by the State Defendants nor has he shown diligence
19 on his own behalf. The motion for summary judgment on the statute of limitations is
20 therefore proper and Mr. Roush's claims against the State Defendants, as they are now
21 alleged and supported, must fail.

22 Although Mr. Roush's pleadings are not presently able to support a claim against the
23 State Defendants, the Court recognizes the general rule that liberal amendments to pleadings
24 are particularly important for pro se litigants. Lopez v. Smith, 203 F.3d 1122, 1130–31 (9th
25 Cir. 2000). When dismissing a complaint by a pro se plaintiff with prejudice, opportunities
26 to amend should be given unless the pleading "could not possibly be cured by allegation of

1 other facts.” Id. It would be difficult to say on the record currently before the Court that Mr.
2 Roush’s ability to prevail on a defense to the statute of limitations is completely foreclosed.
3 The Court also recognizes that it is manifestly unfair to force a party to continue to defend a
4 lawsuit when there is only speculation that a possible actionable claim might exist.

5 Accordingly, the Court GRANTS the State Defendants’ Motion for Summary
6 Judgment, docket no.26, holding that under the current pleadings, Mr. Roush’s claims are
7 barred by the statute of limitations. The Court DISMISSES the State Defendants without
8 prejudice, and holds that Mr. Roush may amend his complaint by August 31, 2007, to re-join
9 appropriate State Defendants in their individual capacities who are dismissed by this order if
10 supported with sufficient factual allegations to overcome the statute of limitations defense.¹

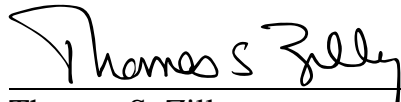
11 **Conclusion**

12 Because Mr. Roush concedes the arguments made by the State Defendants regarding
13 Eleventh Amendment immunity, and because Mr. Roush’s complaint and filings do not
14 presently support any exception to the statute of limitations, the Court GRANTS the State
15 Defendants’ Motion for Summary Judgment, docket no. 26, and DENIES Mr. Roush’s
16 request for discovery, docket no. 31. In light of the absence of prejudice to Mr. Roush
17 regarding the filing and service of the State Defendant’s Reply, The Court DENIES Mr.
18 Roush’s Request to Strike Defendants’ Response, docket no. 42. The Court also DENIES
19 the State Defendants’ Motion to Strike, docket no. 37, in order to reach the merits of the
20 fully-briefed issues in this motion. The Court DISMISSES WITHOUT PREJUDICE the
21 State Defendants in their individual capacities and GRANTS Mr. Roush until August 31,
22 2007, to amend his complaint and allege an actionable claim against these State Defendants.
23 The Court DISMISSES WITH PREJUDICE the State Defendants in their official capacities.

24
25 ¹Mr. Roush, in his response and complaint, argues that the Washington statutes authorizing
26 towing of vehicles are unconstitutional. See Response, docket no. 31. The Court declines to consider
the constitutionality of the statutes because the issue was not briefed and is not necessary for deciding
the present motion.

1 IT IS SO ORDERED.

2 DATED this 2nd day of May, 2007.

3
4 
5 Thomas S. Zilly
6 United States District Judge
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26